132-141

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~311~~. 50

THE FIRST NATIONAL BANK OF CHARLOTTE, NORTH CAROLINA, PLAINTIFF IN ERROR,

vs.

E. A. MORGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED AUGUST 9, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 18, 1889.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of North Carolina, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of the said State in which a decision could be had in the suit between E. A. Morgan, plaintiff in said action, and The First National Bank of Charlotte, N. C., defendant, a manifest error hath happened, to the great damage of the said First National Bank of Charlotte, N. C, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Eastern Dist. of N. C.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 9th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
W. N. H. SMITH,
Chief Justice of the Supreme Court of North Carolina.

2 Upon this writ is endorsed: "E. A. Morgan *v.* The First National Bank of Charlotte. Writ of error. Filed Feb. 11th, 1886."

3 NORTH CAROLINA:

In Supreme Court. October Term, 1885.

E. A. MORGAN
vs.
FIRST NATIONAL BANK OF CHARLOTTE, N. C.

To the Honorable W. N. H. Smith, chief justice:

And now comes The First National Bank of Charlotte, by W. P. Bynum, its attorney, & complains that in the record & proceedings & also in the rendition of a judgment in a suit between E. A. Mor-

gan, pl'ff, and The First National Bank of Charlotte, in the supreme court of North Carolina, being the highest court of law or equity of said State in which a decision could be had in said State, & in which final judgment was rendered against said First National Bank of Charlotte, on the — day of January, 1886, in said suit, wherein was drawn in question the construction of sections 5197 and
4 5198 of the Revised Statutes of the United States & said judgment was adverse to the said First National Bank of Charlotte & against the right, title, privilege, & exemption specially set up & claimed under said statute, all of which appears in the record & proceedings in said suit, manifest error hath happened to the great damage of the said First National Bank of Charlotte.

Wherefore said it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

W. P. BYNUM,
Atto. for Def't.

"The following endorsement appears thereon, to wit:

"The above application is allowed. January 8, 1886. W. N. H. Smith, C. J., &c. At Raleigh, North Carolina.

5 NORTH CAROLINA:

In Supreme Court of the United States. October Term, 1885.

E. A. MORGAN
vs.
FIRST NATIONAL BANK OF CHARLOTTE.

Know all men by these presents that we, The First National Bank of Charlotte, N. C.; R. Y. McAden, and M. P. Pegram, of Charlotte, N, C., are held & firmly bound unto E. A. Morgan, of Cleveland county, N. C., in the sum of two thousand dollars, to be paid to the said E. A. Morgan, his executors, or administrators; to which payment we bind ourselves and each of us, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th January, 1886.

Whereas the above-named First National Bank of Charlotte hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in said action by the
6 supreme court of North Carolina: Now, therefore, the condition of this obligation is such that if the above-named First National Bank of Charlotte shall prosecute its said writ of error with effect and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE FIRST NATIONAL BANK
OF CHARLOTTE, N. C., [SEAL.]
By R. Y. McADEN. [SEAL.]
R. Y. McADEN. [SEAL.]
M. P. PEGRAM. [SEAL.]

Sealed & delivered in presence of—
HUGH W. HARRIS,
U. S. Commissioner, United States of America.

R. Y. McAden & M. P. Pegram, being duly sworn, depose and say, and each for himself sayeth, that he is worth the sum of two thousand dollars over and above all his just debts, liabilities, & exemptions.

R. Y. McADEN.
M. P. PEGRAM.

Sworn before me this 8th day of January, 1886.
HUGH W. HARRIS,
U. S. Commissioner for W. Dist. of N. C.

The following endorsement appears thereon, to wit:

7 The above bond is adjudged sufficient and approved Jan. 8th, 1886, at Raleigh, State of North Carolina. W. N. H. Smith, chief justice, &c.

United States of America to E. A. Morgan, Greeting:

You are hereby admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1886 next, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein The First National Bank of Charlotte is plaintiff in error and you are defendant in error, to show cause, if any you have, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. W. N. H. Smith, chief justice of the supreme court of North Carolina, this 8th day of January, 1886.

W. N. H. SMITH, *C. J., &c.*

8 Upon the foregoing application, citation, and bond is the following endorsement:

"Copy of citation and these preceedings delivered to E. A. Morgan this the 16th day of January, 1886. M. N. Hanwick, sh'ff Cleveland Co.

9 Supreme Court of the United States.

E. A. MORGAN
vs.
FIRST NATIONAL BANK OF CHARLOTTE.

Know all men by these presents that we, the First National Bank of Charlotte, North Carolina; M. P. Pegram, and R. Y. McAden, all of Charlotte and State of North Carolina, are held and firmly bound unto E. A. Morgan, of Cleveland county, North Carolina, in the sum of twenty-five hundred dollars, to be paid to the said E. A. Morgan, his executors, or administrators; to which payment, well and truly

to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this — day of January, 1886. Whereas the above-bounden The First National Bank of Charlotte hath prosecuted a writ of error in the
10 Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of North Carolina at the October term, 1885, of said court: Now, therefore, the condition of this obligation is such that if the above-named First National Bank of Charlotte shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE FIRST NATIONAL BANK
OF CHARLOTTE, N. C., [SEAL.]
By R. Y. McADEN, *Pres't.* [SEAL.]
R. Y. McADEN. [SEAL.]
M. P. PEGRAM. [SEAL.]

Sealed & delivered in presence of—
HUGH W. HARRIS, *U. S. Com'r.*

UNITED STATES OF AMERICA:

M. P. Pegram & R. Y. McAden, being duly sworn, depose and say, and each for himself sayeth, that he is worth the sum of twenty-five hundred dollars over and above all his just debts and liabilities.

R. Y. McADEN.
M. P. PEGRAM.

11 Sworn to before me this 3rd day of February, 1886.
HUGH W. HARRIS,
U. S. Commissioner, W. D. of N. C.

The above bond is tendered to operate as a supersedeas in the above-entitled cause.

I approve the above bond & the sufficiency of the sureties thereto.
W. N. H. SMITH,
Chief Justice, &c.

And upon said bond is the following endorsement:
"All objection to this bond waived, and I consent that it be filed in place of the supersedeas bond heretofore filed, Jan'y 5, 1886. Jno. Devereux, Jr., att'y for defendant in error."

12 *Record from Superior Court.*

STATE OF NORTH CAROLINA, *Cleveland County:*

Be it remembered that on the 19th day of June, 1882, E. A. Morgan sued out of the superior court of Cleveland county a summons in words & figures as follows, to wit:

Cleveland County Superior Court.

E. A. MORGAN
vs.
THE FIRST NATIONAL BANK OF CHARLOTTE, N. C. } Summons.

State of North Carolina to the sheriff of Mecklenburg Co., Greeting:

You are hereby commanded to summon the First National Bank of Charlotte, N. C., the defendant above named, if to be found in your county, to be & appear before the judge of our superior court,
to be held for the county of Cleveland at the court-house, in
13 Shelby, on the 6th Monday after the 4th Monday in September, 1882, & answer the complaint, which will be deposited in the office of the clerk of the superior court of said county within the first three days of the next term thereof, and let the said defendant take notice that if it fails to answer the said complaint within the time prescribed by law the plaintiff will take judgement for the relief demanded in the complaint. Hereof fail not, and of this summons make due return.

Given under my hand & seal of said court this 19th day of June, 1882.

T. D. LATTIMORE,
Clerk Sup'r Court, Cleveland County.

On the return day thereof, to wit, 6th Monday after the 4th Monday in September, 1882, at the court-house in Shelby, before the Honorable J. F. Graves, judge, the said summons was returned endorsed as follows: "Served on the 28th day of July, 1882, by
14 reading the within summons to R. Y. McAden. M. E. Alexander, sheriff of Mecklenburg Co.

15 And the said E. A. Morgan, by his attorneys, Cobb & McBrayer, comes and complains as follows, to wit:

NORTH CAROLINA, *Cleveland County:*

Superior Court. Fall Term, 1882.

E. A. MORGAN
vs.
THE 1ST NATIONAL BANK OF CHARLOTTE, N. C.

Complaint.

The plaintiff complaining, alleges for first cause of action:

I. That the defendant is a corporation doing a general banking business at Charlotte, N. C., created by & under the laws of the United States of America and the State of North Carolina, and known & doing business under the name & style of The 1st National Bank of Charlotte, North Carolina.

That the said defendant, The 1st National Bank of Charlotte,
16 North Carolina, after the 12th day of February, 1877, and before the commencement of this suit, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., upon a certain corrupt contract made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., aforesaid, between the said defendant, The 1st National Bank of Charlotte, N. C., on the one part, and the plaintiff upon the other part, the said defendant took, accepted, and received of and from the plaintiff on said 25th day of May, 1877, a certain sum of money, to wit, the sum of two hundred & twenty-two $\frac{48}{100}$ dollars, by way of corrupt bargain and loan, for the said defendant for bearing & giving and having forborne and given day to the said plaintiff for the payment of a certain sum of money, to wit, the sum of eighteen hundred and fifty-four dollars, on the said 25th day of May, 1877, lent &
17 advanced by the defendant to the plaintiff from the said 25th day of May, 1877, until the 25th day of May, 1878, which said sum of two hundred & twenty-two $\frac{48}{100}$ dollars, so taken, accepted, and received by the defendant from plaintiff, in manner and for the cause aforesaid, exceeds the rate of eight dollars for the forbearance of one hundred dollars for one year, contrary to the form of the statute in such cases made and provided, whereby and by force of the said statute the said defendant owes the said plaintiff the sum of four hundred & fifty-four $\frac{96}{100}$ dollars, that being double the amount of interest paid to defendant by the plaintiff on the amount of money loaned to plaintiff by defendant as aforesaid, for the space of one year as aforesaid and so forborne as aforesaid, and thereby & by force of the said statute an action has accrued to plaintiff to demand & have for himself in this behalf & from the defendant the said sum of $444.98.

18 II. For second cause of action plaintiff, complaining, alleges—

That the said defendant, after the 12th day of February, 1877, & before the commencement of this action, to wit, 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious contracts, made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the said defendant, on the one part, and the plaintiff, on the other part, took, accepted, & received of & from the plaintiff certain sums of money, amounting in all to the sum of seven hundred & ninety-three $\frac{92}{100}$ dollars, by way of corrupt bargain & loan, for the said defendant, forbearing & giving & having foreborne & given day to the plaintiff for the payment of a certain sum of money, to wit, the sum of
19 sixteen hundred & fifty-four dollars, theretofore, to wit, on the 25th day of May, 1878, and at subsequent times and dates thereto, in the city of Charlotte, N. C., aforesaid, lent & advanced by the said defendant to the said plaintiff, said amount being lent & advanced by the defendant to the plaintiff for sixty days at a time, the whole time from the said 25th day of May, 1878, until the 13th

day of June, 1882, the time named, was loaned plaintiff by defendant, being four years & 18 days, which said sum of seven hundred & ninety-three $\frac{92}{100}$ dollars so taken & accepted & received by the defendant of & from the plaintiff in the manner & for the cause stated as aforesaid exceeds the rate of eight dollars for the forbearance of one hundred dollars for one year, contrary to the form of the statute in such cases made and provided, whereby and by force of the said statute the said defendant forfeited & owes to
20 plaintiff for said offense the sum of fifteen hundred and eighty-seven $\frac{84}{100}$ dollars, that being double the amount of interest by plaintiff to defendant for the loan and forbearance of the sum of $1,654 from the 25th day of May, 1878, until the 13th day of June, 1882, & thereby and by force of the said statute an action hath accrued to the plaintiff against the defendant for the sum of $1,587.84, for which amount plaintiff sues.

III. For a third cause of action plaintiff complains and alleges that the defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., upon a certain corrupt and usurious contract made after the 12th day of February, 1877, aforesaid, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and
21 the plaintiff, on the other part, took, accepted, and received of and from the plaintiff a certain sum of money, to wit, the sum of sixty dollars, by way of corrupt bargain and loan, for the said defendant forbearing and giving day and having forborne and given day to the plaintiff for the payment of a certain sum of money, to wit, the sum of one thousand dollars, on the said 25th day of May, 1877, until the 25th day of December, 1877, which said sum of sixty dollars so taken, accepted, and received by the defendant from the plaintiff in manner and for the causes aforesaid, exceeds the rate of eight dollars for one year, contrary to the statute in such cases made and provided, whereby and by force of the said statute the said defendant forfeited for said offense and owes to the
22 plaintiff the sum of one hundred and twenty dollars, that being double the amount of interest paid to defendant by plaintiff for the forbearance and loan of the one thousand dollars for the time as above alleged, and thereby and by force of the statute for usury and action hath accrued to plaintiff against the defendant for the sum of $120, which amount plaintiff claims and sues for.

IV. For fourth cause of action plaintiff, complaining, alleges that the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of March, 1877, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious agreements and contracts made after the 12th day of February, 1877, as
23 aforesaid, to wit, on the 25th day of March, 1878, — at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and the plaintiff on the other part, took, accepted, and received from the

plaintiff certain sums of money at various times, amounting in all to the sum of three hundred and seventy-seven $\frac{98}{100}$ dollars, by way of corrupt and usurious bargain and loan, for the said defendant forbearing and giving day to the plaintiff for the payment of seven hundred and fifty-nine dollars theretofore, to wit, on the 25th day of December, 1877, and at subsequent times and dates thereto, in the city of Charlotte, N. C., aforesaid, lent and advanced to the plaintiff by the defendant, said amount being
24 lent and advanced to the plaintiff by the defendant for sixty days at a time, the whole time from the 25th day of December, 1877, until the 19th day of June, 1882, when plaintiff quit paying usurious interest, being four years 5 months and 24 days; which said sum of three hundred and seventy-seven $\frac{98}{100}$ dollars, so taken, accepted, and received by the defendant of & from the plaintiff, in the manner and for the cause stated as aforesaid, exceeds the rate of eight dollars for the forbearance of one hundred dollars for one year, contrary to the statute in such cases made and provided, whereby the defendant forfeited and owes to the plaintiff for said offense the sum of seven hundred and fifty-five $\frac{96}{100}$ dollars, that being
25 double the amount of interest paid by the plaintiff to the defendant for the loan and forbearance of the sum of $759.00 from the 25th day of December, 1877, until the 19th day of June, 1882, and thereby and by force of the said statute an action hath accrued to plaintiff against the defendant for the sum — $755.96, for which am't plaintiff sues.

V. That the plaintiff, in addition to the usurious interest *interest* heretofore mentioned, has paid before the commencement of this action all the notes hereinbefore referred to and mentioned, excepted one note for $759.00, executed and delivered to the defendant by plaintiff on the 19th day of April, 1882.

VI. That each and every one of the notes constituting the contract hereinbefore set forth were made payable on their face to one M. C. Roberts by plaintiff, and by said M. C. Roberts endorsed.

VII. That said notes so endorsed were received by the de-
26 fendant as the contracts hereinbefore referred to.

VIII. That the manner of executing said contracts and said endorsements by said M. C. Roberts was in the knowledge and at the request of the defendant.

IX. That said M. C. Roberts received no benefit from said contracts and was only liable thereon as endorser, and bore none of the burdens of same and has no interest in this action.

X. That as to each cause of action hereinbefore set forth subsequent to the first the plaintiff hereby adopts, without repeating same, the 1st allegation of the 1st cause of action. Wherefore the plaintiff demands judgement against the defendant for the sum of three thousand dollars, with interest thereon until paid, and the costs of this action, & other and further relief.

COBB & McBRAYER,
Atty's for Plaintiff.

27 E. A. Morgan makes oath that the facts set forth in the

foregoing complaint of his own knowledge are true and those stated herein on information and belief he believes to be true.

E. A. MORGAN.

Sworn to & subscribed before me January 13th, 1883.

T. D. LATTIMORE,
C. S. C., Cleveland County.

28 And the said First National Bank of Charlotte, N. C., by its attorney, W. P. Bynum, comes and pleads as follows:

Answer.

NORTH CAROLINA, *Cleveland County:*

Superior Court. Fall Term, 1882.

E. A. MORGAN

vs.

THE FIRST NATIONAL BANK OF CHARLOTTE, N. C.

The defendant, answering the complaint filed against it in the above-entitled action, for answer thereto, answering, says:

1. That it admits so much of the first paragraph of the complaint as alleges that the defendant is a corporation organized and doing the banking business, as alleged, under the laws of the United
29 States, but does not admit that it is organized or created under the laws of the State of North Carolina.

2. For answer to the second paragraph of the complaint this defendant says that the same is not true as therein set forth and alleged, and therefore denies the same.

3. As to the third paragraph of the complaint, this defendant answers and says that the same is not true as therein set forth and alleged, and therefore it denies the same.

This third paragraph is styled (II) in the complaint, and is therein called the second cause of action.

30 4. For answer to the fourth paragraph of the complaint, marked therein (III) & called the third cause of action, this defendant says the same is not true as therein set forth and alleged, & therefore it denies the same.

5. For answer to the fifth paragraph of the complaint, called in the complaint the fourth cause of action, this defendant says that the same is not true as therein set forth & alleged, & therefore it denies the same.

Further answering the complaint, this defendant pleads in bar of the action & the several causes of action therein set forth & alleged the limitations prescribed in the act of Congress styled "An act to provide a national currency," &c., approved June 3rd, 1864, & acts amendatory thereof, under which acts defendant — organized & doing business, & which acts prescribed the time under which
31 actions for the penalty claimed in the complaint shall be commenced.

The defendant, having answered, prays hence to be dismissed with its reasonable costs, &c.

R. Y. McAden makes oath that he is the president of the defendant bank, which is a corporation created & doing business under the laws of the United States; that the facts set forth in this answer of his own knowledge are true, except as to those matters stated on information & belief, and as to those matters he believes them to be true.

R. Y. McADEN.

Sworn to & subscribed before me April 25th, 1883.
J. R. ERWIN, *C. S. C.*

And at the next term of said court, to wit, seventh Monday after the fourth Monday in March, 1883, before the Honorable W. M. Shipp, judge, this cause was continued.

32 And at the next term of said court, to wit, seventh Monday after the fourth Monday in September, 1883, at the court-house, in Shelby, before the Honorable John A. Gilmer, judge, this cause was continued.

And at the next term of said court, to wit, seventh Monday after the fourth Monday in March, 1884, at the court-house, in Shelby, before the Honorable J. C. McRae, judge, this cause was continued.

And at the next term of said court, to wit, seventh Monday after the fourth — in September, 1884, at the court-house, in Shelby, before the Honorable A. A. McKoy, judge, this cause was continued.

And at the next term of said court, to wit, seventh Monday after the fourth Monday in March, 1885, at the court-house, in Shelby, before the Honorable Fred. Philips, judge, the following

33 proceedings were had in this cause:

34 E. A. MORGAN
vs.
FIRST NATIONAL BANK OF CHARLOTTE, N. C.

Whereupon comes the following jury, to wit:

C. C. Grigg, W. D. N. Covington, P. Z. Carpenter, N. E. Boggs, A. Nolin, T. F. Elliott, E. C. White, S. McB. Postin, A. B. Graham, J. P. Falls, T. J. Dixon, A. M. Cabaness, who being chosen, sworn, & empanelled, for their verdict say they find all issues in favor — the plaintiff, and assess his damages at $1,108.56.

Judgment.

This cause having been tried at this term of the court before his honor F. Philips, judge presiding, and a jury regularly sworn & empanelled, and the jury, in response to the issues submitted to them, having found that the plaintiff paid to defendant, upon the usurious contracts described in the second & fourth counts of plain-

tiff's complaint, as interest, the sum of five hundred & fifty-
35 four $\frac{28}{100}$ (554.28) dollars during the two years next preceding the institution of this action; & the said jury having returned their verdict in favor of the plaintiff & against the defendant for the sum of eleven hundred & eight $\frac{56}{100}$ (1,108.56) dollars—

It is now, therefore, on motion of McBrayer & Cobb, attorneys for the plaintiff, ordered, adjudged, & decreed that plaintiff, E. A. Morgan, have & recover of defendant, First National Bank of Charlotte, N. C., the sum of eleven hundred & eight $\frac{56}{100}$ (1,108.56) dollars, with interest thereon from the 11th day of May, 1885, & the costs of this action, to be taxed by the clerk.

Motion by defendant for new trial, motion in arrest of judgement; both motions disallowed.

Defendant prays an appeal to the Supreme Court.

Appeal granted; notice waived; appeal bond in the sum of $50 adjudged sufficient; appeal bond and bond to suspend execution filed in open court and accepted.

36 *Statement of Case.*

Statement of case by the Honorable Fred. Philips, judge presiding.

North Carolina, *Cleveland County:*

Superior Court. Spring Term, 1885.

E. A. Morgan

vs.

First National Bank Charlotte, N. C.

Civil action to recover money, tried before Philips, judge, and a jury at the spring term, 1885, of Cleveland superior court.

The plaintiff, E. A. Morgan, was introduced as a witness in his own behalf, and was asked by his counsel to testify as to the contract between himself and the bank, as set forth & alleged in the first & third causes of action in the complaint.

The defendant objected upon the ground that said alleged causes of action were barred by the statute. The court sustained
37 the objection and excluded all testimony as to the first & third causes of action.

The witness was then asked by his counsel to testify as to the contract of loan & interest taken, as set forth and alleged in the 2nd & 4th causes of action in the complaint.

The defendant objected and the objection was sustained by the court to the extent of ruling out all testimony as to any transaction that took place under the second & fourth causes of action in the complaint for more than two years prior to the institution of this action.

The court ruled that the evidence was competent as to any con-

tract of loan & illegal interest taken, accepted, and received for two years preceeding institution of this action.

To this ruling of the court the defendant excepted.

The witness was then directed to speak only of the dealings between himself and the defendant, as alleged & set forth in the second & fourth causes of action in the complaint, for two years prior
38 to the institution of this action.

The witness then testified that the sums of $1,654.00 and $759.00, referred to in the 2nd & 4th counts, were advanced & lent to him by the def't for 60 days at a time.

The first sum was lent 25th May, 1878, and the second sum was lent in ——, 1879. On the 19th day of June, 1880, he executed to defendant his note for $759.00 for 60 days, for which he paid as interest for said time the sum of $15.94.

That said note was drawn payable to the order of M. C. Roberts and discounted at the bank.

That on the 25th day of July, 1880, he executed another note to the defendant for $1,654.00, payable to the order of M. C. Roberts & discounted at the bank, for 60 days, and he paid $33.00 as interest for said time.

The plaintiff then testified that said two notes were renewed, respectively, every 60 days thereafter upon payment by him of $15.94 on the smaller and $33.00 on the larger note for forbearance
39 for 60 days until he paid the principal of the larger note, in June, 1882, & the smaller one before the commencement of this action.

The witness then refreshed his memory by reading from the stubs on his draft book the dates & amounts sent by draft to defendant for indulgence, and testified that the aggregate amount paid by him for two years prior to this action was $554.28.

All the notes were made payable to M. C. Roberts, and it was done at the direction of R. Y. McAden. M. C. Roberts was endorser & had no interest in any of said notes. R. Y. McAden was president of the bank and Pegram was the cashier. I paid the principal of the $1,654 note in June, 1882, and I paid the $759 note before I commenced this action.

Upon cross-examination the witness testified: I know the notes from my own knowledge. I did not go down to Charlotte
40 every time on the 19th of the month. I always renewed them by mail, sometimes before & sometimes after the dates of renewals, but all the notes in renewal are dated as I have given. Sometimes there would be a controversy between me and Pegram about the amounts due—days of grace; but I am sure that $15.94 is the least I paid on the $759 note, and $33.00 is the least I paid on the $1,654 note, for 60 days' indulgence. I drew on E. A. Morgan's money and in the name of E. A. Morgan & Co. for the sums due, but I used the money as my own. The parties I drew on would pay the drafts. The first draft was paid July 19th, 1880. Sometimes the drafts were drawn in South Carolina, sometimes in Shelby, or whereever I was. I always drew the defendant a draft for
41 the sums due for the 60 days' indulgence on renewal of loans

and sent them by mail. Some of the drafts were drawn in the name of Morgan, Falls & Son, some in E. A. Morgan & Co., & some in my own name. I can't say when they were received at the bank, but I knew, and there was an understanding between us, that I was to pay at the certain day the bank required it. Sometimes my notes went to protest when the money sent would not get there in time, but — bank always accepted and gave up my old notes if it was before or behind the dates of payment. The interest specified in the notes was 8 per cent. after maturity.

On redirect examination the witness testified that he paid the interest at the rate of 12 per cent. for the forbearance, and the whole amount paid was $554.28.

42 The above was all the evidence given in the case. The defendant insisted that from the evidence the plaintiff could not recover, owing to the variance between the allegations of the complaint & the evidence.

The court asked the counsel for the defendant if he had been misled by any variance, to which he made no reply.

The court held there was no variance, or if there was a variance it was immaterial in this action unless the defendant has been misled. In his argument to the court the plaintiff claimed damages for twice the amount of all the interest paid, while the defendant's counsel claimed that the plaintiff could only be entitled to recover twice the excess of interest. The jury, under the instruction of the judge, returned a verdict for double the amount of the interest ascertained by them to be paid during the two years next

43 preceeding the instruction of this action.

Motion for new trial & motion denied. The defendant then moved an arrest of judgment, which motion was refused and judgement rendered for the plaintiff and against the defendant for $1,108.56, from which the defendant prayed an appeal to the supreme court, which was allowed. Notice of appeal was waived; appeal bond in the sum of $50 was adjudged sufficient; given and accepted; bond was also given to suspend the execution, which was accepted.

The above is the case settled by me for the supreme court—

The counsel agreeing that I should take the case as made out & served by the appellant and the exceptions made and served

44 by the respondent, together with my notes of the trial, and sign and settle the case for the supreme court without their presence.

(Signed) FRED. PHILLIPS,

Judge Supreme Court, Riding, 6th District.

45 *Appeal Bond.*

NORTH CAROLINA, *Cleveland County:*

Superior Court. Spring Term, 1885.

E. A. MORGAN
vs.
FIRST NATIONAL BANK OF CHARLOTTE, N. C. } Appeal Bond.

Whereas the defendant in this cause has taken an appeal from the judgement rendered against it, and the appeal bond has been fixed at $50:

Now we, The First National Bank of Charlotte, N. C., and R. Y. McAden, undertake, in the sum of $50, that defendant will prosecute its said appeal with effect and pay such costs & damages as may be awarded against it in the same.

THE FIRST NATIONAL BANK
OF CHARLOTTE,
By R. Y. MCADEN, *President.* [SEAL.]
R. Y. MCADEN. [SEAL.]

46 Personally appeared before me, J. R. Erwin, C. S. C., of Mecklenburg county, R. Y. McAden, the security to the foregoing bond, who, being duly sworn, says that he signed same as security and is worth double the amount of said bond over & above his exceptions, debts, & liabilities, and is a householder and freeholder in Mecklenburg county, N. C.

Witness my hand & seal this 20th day of May, 1885.

R. Y. MCADEN.

Sworn to & subscribed before me May 20th, 1885.
[SEAL.] J. R. ERWIN, *C. S. C.*

47 NORTH CAROLINA, *Cleveland County:*

I, T. D. Lattimore, clerk of the superior court for the county & State aforesaid, do hereby certify that the foregoing is a true & perfect transcript of the records, &c., in the case of E. A. Morgan against The First National Bank of Charlotte, N. C.

Witness my hand and seal of office this 25th day of July, A. D. 1885.

[Seal of Superior Court of Cleveland County.]

T. D. LATTIMORE, *C. S. C.*

48 North Carolina Supreme Court. October Term, 1885. No. 502. Cleveland County.

E. A. MORGAN
vs.
FIRST NATIONAL BANK OF CHARLOTTE. } Judgment.

This cause came on to be argued upon the transcript of the record

from the superior court of Cleveland county; upon consideration whereof this court is of opinion that there is no error in the record and proceedings of the said superior court.

It is therefore considered and adjudged by the court here that the opinion of the court, as delivered by the Honorable W. N. H. Smith, chief justice, be certified to the said superior court, to the intent that the judgment be affirmed; and it is considered and adjudged further that the plaintiff, the said E. A. Morgan, do recover from the defendant, the said First National Bank of Charlotte, and the surety for the appeal, R. Y. McAden, the costs of the appeal in this court incurred, to wit, the sum of fourteen $\frac{50}{100}$ dollars ($14.50), and let execution issue therefor.

A true copy.

[Seal of the Supreme Court of the State of North Carolina.]

Test: THO. S. KENAN, *Clerk.*

49 In the Supreme Court of North Carolina.

MORGAN
vs.
THE FIRST NATIONAL BANK OF CHARLOTTE, N. C.

Opinion Delivered by Chief Justice Smith.

The plaintiff's action, commenced on June 19th, 1882, in the superior court of Cleveland against the defendant, a corporation formed and doing business as a banking association under the act of Congress, at Charlotte, in Mecklenburg county, is to recover double the amount of usurious interest exacted and paid during several years upon loans of money, as set out in the complaint. To these allegations the defendant opposes a direct denial, and also relies upon the defense of the statute of limitations prescribed in the act, which
50 requires the suit to be begun within two years.

Banks organized under the law are allowed to take such interest on the loan of money as is authorized by the law of the State wherein such bank is located, and no more, except that if a greater rate is permitted to banks of issue organized under the laws of the State the national associations may charge the same. Revised St. U. S., sec. 5197.

The plaintiff's claim is based upon the concluding clause of the next section, 5198, which is in these words: "In case the greater rate of interest has been paid, the person by whom it has been paid or his legal representatives may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

51 This section, by the subsequent act of February 18th, 1875, was amended by adding thereto the following: "That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the

United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

As the national banking act in its original form contains no provision in reference to the exercise of jurisdiction in enforcing the penalty incurred by the exaction of usurious and unlawful interest on loans and the law was general and operative as such upon all judicial tribunals, State as well as Federal, the courts of the State could take cognizance of violations of the enactment and afford redress to suitors who sought their aid.

52 This convenient power, when not under the Constitution or laws of the United States committed to the exclusive jurisdiction of their own courts, could be shared by the courts of the State, according to the measure of jurisdiction conferred upon them by the law of the State, as decided in many cases, and upon an elaborate argument delivered by Mr. Justice Bradley in the opinion in Claflin *vs.* Houseman, 93 U. S., 130, in support of the right of an assignee in bankruptcy to sue in a State court for the money of part of the trust estate.

The cases therein cited are demonstrative of the conclusion reached by the court. But the exclusion of the State courts from participating in the administration of a law of the United States and enforcing its commands and penalties need not be in express and positive terms, but may be by clear and manifest implication, and when certain local State courts are designated as the depositories of the power the inference must be drawn of an intentional

53 withholding of it from others not of that class.

The implication of a purpose to confine the exercise of a general jurisdiction possessed by the courts of the State over suits prosecuted for the imposed penalty of taking unlawful interest is manifestly found in the amendment of 1875, which specifies the local courts to whom the jurisdiction is confided, and none others, therefore, may rightfully exercise it. This conclusion unavoidably follows from the terms of the amendment. But the section was again modified by the "Act to enable banking associations to extend their corporate existence, and for other purposes," appended [approved] July 12th, 1882, which enlarges the sphere of jurisdiction of the State courts by substituting for the former the following amendment:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits, &c. (not embraced in the present inquiry), shall be the same as and not other than the juris-

54 diction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." (Acts 47th Congress, 1 sess., ch. 290, sec. 4.) This enactment opens the doors for the entry of all suitors

aggrieved by oppressive usurious charges exacted into the courts of the State competent to furnish redress had the cause of action originated in the like lawless conduct of a bank chartered by the State.

But the plaintiff can take no benefit under the change in the law, inasmuch as he began his suit in the month of June previous to the approval of the act, and its operation is restricted to such suits as may be, using its own words, "hereafter brought," and does not apply to such as were then depending.

In committing jurisdiction to the special courts mentioned in the amendment of 1875 it left that jurisdiction to be
exercised under the State laws, which direct and gov-
55 ern their practice & mode of proceedure. The assumption of cognizance of the cause by the superior court of Cleveland, instead of the same court of Mecklenburg, stands upon the same footing as the assumption by the court of a county of jurisdiction of a matter of State law which it does not possess and which is confided to the court of a different county. The objection to the jurisdiction must in such cases be made *in limine* before putting in an answer, and, if well taken, the result is a transfer to the court of a county which has jurisdiction. Code, sec. 195; Lapoon *vs.* Shearin, 90 M. C., 370. It is not a defect in the jurisdiction of a State court over the subject-matter in dispute, but the selection of the wrong local court wherein it is to be exercised, the remedy for which is the transfer of the cause to the rightful court at the election of the defendant; and when, no such election being made, the cause proceeds to trial, it is a waiver too late to recall and it must abide the result.

There is no analogy to be found in the rule applicable to
56 courts of limited and special jurisdiction, such as those which the United States possess, and which is delegated in its full extent by positive law. In these, whenever upon the face of the proceedings a want of jurisdiction appears, the court, of its own motion and without a formal exception taken, will refuse to proceed further; but the State superior courts possess general jurisdiction and will be interrupted in a particular case only when, in apt times, the objection is brought forward and passed on.

The appellant insists that the averments in the complaint are so vague & uncertain that no judgment can be rendered upon them, and it should therefore be arrested.

The defendant, without making this exception, which, if maintainable, might have been removed by amendment making the allegations more specific, proceeded to answer & controvert the allegations of fact as if fully understood by it.

Testimony was not allowed to sustain any but the second &
57 fourth counts or separate causes of action set out in the complaint, and the others were thus virtually eliminated from it. In examining those on which evidence was introduced to support, we think *we think* they do sufficiently describe the wrongful acts and exactions out of which the cause of action arises. They specify the two separate principal sums constituting the indebtedness and the moneys exacted as at interest of sixty days thereafter, the dates

of each being given up to the institution of the suit, on June 13th, 1882.

All such as was received anterior to the two years immediately preceeding were rejected and the jury allowed to render a verdict for double the sums thus taken during that period. The debts and the usury on each are specified, the one in the second, the other in the fourth, cause of action assigned; and thus the defendant is furnished in these allegations with all the information necessary to make
58 his defense; and this is the office of the complaint as it was of the old declaration in pleading.

The appellant again, upon the trial, alleged that there was a variance between the allegations in the complaint and the proofs offered, in reference to which the court inquired of its counsel if he had been misled thereby, without receiving any response, with a view to the correction, if necessary, under section 269 of the Code. We have had occasion to comment on this provision, in Halstead *vs.* Mullen, at this term.

The appellant's counsel further, in support of his motion in arrest of judgment, urges that the complaint is fatally defective in failing to "negative that there are State banks of issue which by law are allowed a greater rate of interest than is allowed by the general law of the State."

59 It is to be observed that the complaint avers a taking of interest for a forbearance of a loan of money greater than at the rate of eight per centum per annum, and the court judicially takes notice of the fact that this is the maximum allowed by contract under the general law of the State, and that no banking institution incorporated by the State can legally take more.

Why was it necessary to make the averment that the highest legal rate allowed by law was that mentioned, or that no more could be demanded and taken by a State bank?

Each would have been a public law, and when the facts are stated which show its violation and the incurring the penal liability therefor this must be sufficient as a statement of a cause of action against the wrong-doer. It is not necessary, certainly, to say there is
60 no law under which, if there was, the defendant can find shelter for its acts, when the court knows there is none.

It is not like the case of a statute, which is itself qualified by an exception resting upon facts, which facts must be negatived to brin g the case under the operation of the law, as the court has had several times occasion to remark, in considering public criminal accusations, in arriving at its true meaning. Here the facts are set out which show that the law has been violated, and this being known to the court, relief will be granted and the wrong redressed.

Upon a full examination of the exceptions in the light of the able argument of counsel in support, we find and so declare that there is no error of which the appellant can complain, and the judgment must be affirmed. It is so ordered.

SMITH, *C. J.*

61 North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled "E. A. Morgan against The First National Bank of Charlotte," as appears of record in this court.

Seal of the Supreme Court of the State of North Carolina.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 9th day of March, 1886.

THOS. S. KENAN,
Supreme Court Clerk.

Endorsed on cover: North Carolina supreme court. No. 311. The First National Bank of Charlotte, N. C., plaintiff in error, *vs.* E. A. Morgan. Filed August 9, 1886.

Office Supreme Court, U. S.
FILED.
OCT 21 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 311.

THE FIRST NATIONAL BANK OF CHARLOTTE, N. C.

vs.

E. A. MORGAN.

1. The action was begun in the County of Cleveland against the plaintiff in error, located and doing business in the County of Mecklenburg. See Transcript of Record, page 5.

2. By the Constitution of North Carolina, a term of the Superior Court is held twice a year, in each County of the State, all such courts having equal jurisdiction in their respective Counties. Bat. Rev. Constitution, Art. IV. Sec's 4, 12, 15; Also second Vol. Code. Constitution, Art. IV. Sec. 10, and Code. Sec. 910.

Had the Court of the County of Cleveland jurisdiction of this action?

The National Banking Act was amended by ch. 80. S. 18, p. 320 of an act of Congress, ratified 18th February, 1875, and is contained in S. 5198 of the

Rev. Stat., and is as follows: "That suits, actions and proceedidgs against any association under this title, may be had, * * * * * *or in any State, County or Municipal Court, in the county or city, in which said Association is located*, having jurisdiction in similar cases."

The question presented in the above amendment of the Statute has been decided by the Supreme Court of the United States.

Casey vs. Adams, 102 U. S. R. 66, differs from our case, only in that the action related to real estate, which was held to be a *local* action, in contradiction to *transitory* actions.

CH JUSTICE WAITE delivered the opinion of the Court.

"The Federal question," he says, "in this case, is whether a National Bank can be sued in a State Court, in a local action, in another county or city, than where the Bank is located." * * * * "This, we think," (reciting the act of Congress as above set forth) "relates to transitory actions only, and not to such actions, as are by law, local in their character. * * * * * The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribe generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits, *in rem*, and are to be prosecuted where the thing on which they are founded is situated."

It is clear, from this case, that had the action been a transitory action, like the one now before the Court,

it would have been dismissed for the want of jurisdiction. So held in *Croker vs. First National Bank*, 101 *Mass*, 240. This must be so. For the State Courts, are Courts of *special* jurisdiction, made so by the act of Congress, giving and limiting the jurisdiction in transitory actions to the Courts of the *county or city* wherein the Bank is located; in other words, *conferring* jurisdiction, only upon such special county or city Courts, and by implication, excluding all others.

In all such cases, the action will be dismissed, not only where the want of jurisdiction affirmatively appears, but likewise, where the jurisdiction does not affirmatively appear in the complaint and pleadings.

M. C. & L. M. Railway vs. Swan, 111 U. S. R. 379.

This case reviews the decisions of the Supreme Court upon the question of jurisdiction, and fully establishes the doctrine that the judicial power of the United States must not be exerted in a case to which it does not extend, *even if both parties desire to have it exerted*, and it is applied in all cases where the jurisdiction does not appear from the record, and whether a plea is filed to the jurisdiction or not. The parties themselves cannot waive it, and the courts will act *of their own motion* and dismiss the action.

See U. S. vs. Huckabee, 16 Wall, 414, p. 435.
Pequignot vs. Penn. R. R. 16 How. 104.
In Dred Scott vs. Sandford, 19 How. on pp. 400-402,

although the plea to the jurisdiction was overruled, and the defendant did not except thereto, or seek to reverse it in his writ of error, and also waived this defence by pleading over, yet it was held that the plaintiff must show, in his pleading, that the suit he brings is within the jurisdiction of the Court, and that he is entitled to sue there. "And if he omits to do this,

and should by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate Court for want of jurisdiction in the Court below."

2. The motion to dismiss, we have seen, can be made at any time in the United States Courts for want of jurisdiction, and the Court cannot entertain a suit for any purpose but to dismiss it, where it perceives a want of jurisdiction, and the next question is, whether Sec. 195 of the Code of N. C., can be applied so as to confer jurisdiction. That Section provides as follows: "If the county designated in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties or by order of the Court."

It is difficult to perceive how a statute of a State can give jurisdiction in a Federal question where the law of Congress does not give it or provide for its being given by the State, and where the jurisdiction is fixed by that law.

When the action was brought in Cleveland, the Court of that county had *no* jurisdiction, the action was *coram non judice*, and the only jurisdiction it had was to dismiss. A case can be removed only by a Court having jurisdiction. A court having no jurisdiction cannot confer jurisdiction. It cannot be pretended that a United States Court having no jurisdiction of a case can remove it to another United States Court having jurisdiction. All the decisions are that it can only dismiss.

July 12th

ACT OF CONGRESS OF ~~JUNE 19TH~~, 1882.

If the 4th section of this act, the *proviso*, enlarges the jurisdiction of the State Courts so as to embrace cases like the present case, it does not apply, here, because this action was begun *prior* to the said statute, to-wit: on the 19th June, 1882, while the statute was passed on the 12th July succeeding.

By the Code of N. C., sections 161, 199 and 830, the action *commences* when the summons is issued.

Wheeler vs. Cobb, 75 N. C. 21.
Etheridge vs. Woodly, 83 N. C. 11.

If the Superior Court of Cleveland County had no jurisdiction at the commencement of the action, it is not given by the act in cases where the actions had already been begun.

The rule is that a statute takes effect from the date of its passage.

Matthews vs. Zane, 7 Wheat. at Page 211; also 5 Wheat. 244.

The ground upon which the State Courts can, remove to another county, is in the provision of *the Code*, Sec. 195, but that is not for want of jurisdiction but to change the place of the trial only. But the National Banking Act, in the very section, giving the penalty, designates and limits the Courts that may enforce the penalty. The penalty and the Courts go together and one can no more be disregarded than the other. The power must be exercised as given. The Superior Court of Cleveland having no jurisdiction of the action, was only competent to dismiss, and as the want of jurisdiction cannot be waived, the motion must be allowed in this Court, or whenever or wherever made, or whether made at all, where the record shows a want of jurisdiction.

The Code, S 242.
Tucker vs. Baker, 86 N. C., 1
Green vs. Dawson, 92 N. C., 61.
Detroit R. W Co., vs. Guthard, 114 U. S., 133.

It is not the "Judiciary act of Congress" that governs the case, but the "National Banking Act," and neither State legislation or judicial construction can affect the jurisdiction as pointed out in Sec. 5198 of the Banking law.

Commercial Nat. Bank vs. Simmons, 1 Flip., 452.
Union Nat. Bank vs. City Chicago, 3 Biss., 88
Main vs. Second Nat. Bank Chicago, 6 Biss., 26.
Cadle vs Tracy, 11 Blatch, 106
Old Ham vs. Bank, 85 N. C., 240.

See, also as throwing light upon the subject.

New Orleans Nat. Bank vs. Adams, 3 Woods, 24.
Manufacturers Nat Bank vs. Black, 8 Blatch, 138.

II.

Statute of Limitations Contained in the Act.

The complaint sets forth two contracts of loan entered into with the Bank, one in 1877 and the other in 1878, and the alleged usury in the aggregate and without stating the per cent of interest paid, is claimed to have been received under these contracts, without setting out in the complaint or alleging specifically, a single case of payment of usurious interest, within two years after the beginning of the action. The complaint must show the offence to have been done within two years to support the action. Therefore, the complaint does not set forth facts sufficient to constitute a cause of action.

Forfeitures are not favored in law, and the Courts always incline against them. The entire offence of receiving usurious interest, at different times, prior to the commencement of the action, upon the same contract, without setting out any particular

sum or payment, within two years, constitutes but one cause of action, and that cause is lost by lapse of time. If the complaint does not set out a cause of action, no evidence is admissible, to *make* a cause of action, else all pleadings are useless.

Kempton vs. Sullivan, Sav. Inst., 53 N. H., 581.

2. The plaintiff neither amended or asked to amend his complaint, the evidence was incompetent and the action was barred. In an action to recover a forfeiture, the declaration must set forth every fact which is necessary to inform the Court that his case is within the statute

Comyns Dig. Pleader (c. 50) (c. 2*r*).
Wright vs. Wheeler, 8 Ired., 184.
Shelton vs. Davis, 69 N. C., 324.
Oates vs. Gray, 66 N. C., 442.

III.

The Averments not Sufficient to Constitute a Cause of Action.

The complaint does not allege what is the legal interest fixed by the laws of the State, *nor does it negative that there are State banks of issue, which by law are allowed a greater rate of interest than is allowed by the general law of the State.*

In a penal action, the averments of the complaint must comply strictly with the statute giving the penalty, and the complaint must contain all the averments therein required, and negative all matter in the statute going to defeat or qualify the right of action. The Court must see from the complaint itself, as compared with the statute, that the plaintiff is entitled to recover. Banks are private corporations, and the Court cannot judicially know that there are no banks in this State, whose charter allows them to take interest greater

than that allowed by the general law of the State. The complaint must contain the averment and denial that there are such banks, as well as allege and show what is the legal rate of interest.

Rev. Stat. U. S., Sec 5197.

If the Court should hold that it can help out the complaint, because it is bound to know the rate of interest allowed by the public law of the State, it is submitted that that principle cannot apply to help out the complaint, by supplying the want of the averment that there are no banks of issue in this State, where a different rate of interest is allowed.

1 Sanders 262, Note 1. by Williams.

This view of the insufficiency of the complaint is the more conclusive because this qualification as to State banks, is inserted in the act as an "exception," in regard to which the rule of pleading is this: "If there be an *exception* in the enacting clause of a statute, it must be *negatived* in pleading; but if there be a separate *proviso* that need not, and the defendant must show that by way of defence.

1 Kent Com. 463.

Ours is an *exception* in the Statute

Com. Dig. Pleader (c 22.)
1 Saunders Rep. 262, note 1.

3. While the construction put upon declarations for penalties may be more liberally construed now, the rules requiring certainty are not abolished.

McKay vs. Woode, 6 Ired., 352.
Allen vs. Ferguson, 6 Ired., 17
McKee vs. Lineberger, 69 N. C., 217.
3 Jones, 138.

The motion in arrest of judgment should have been allowed. If the declaration is defective, or if upon the whole record, the plaintiff is not entitled to the judgment he asks, it will be arrested

Wright vs. Wheeler, 8 Ired., 184.
Love vs. Commissioners, 64 N. C., 706.

Wm. T. Clarke.
Atty. for Appellant.

Office Supreme Court U. S.
FILED.
OCT 15 1889
JAMES H. McKENNEY.
CLERK.

No. 50.

Supreme Court of the United States,

OCTOBER TERM, 1889.

THE FIRST NATIONAL BANK OF CHARLOTTE, NORTH CAROLINA,
Plaintiff in Error,

vs.

E. A. MORGAN.

BRIEF FOR DEFENDANT IN ERROR.

JOS. B. BATCHELOR,
(Of Batchelor & Devereux,
Attorney for Defendant in Error.

E. M. UZZELL, PRINTER AND BINDER, RALEIGH.

E. M. UZZELL, PRINTER AND BINDER, RALEIGH.

No. 50.

Supreme Court of the United States,

OCTOBER TERM, 1889.

THE FIRST NATIONAL BANK OF CHARLOTTE, NORTH CAROLINA,
Plaintiff in Error,
vs.
E. A. MORGAN.

Brief for Defendant in Error.

FACTS.

The defendant in error brought his action against the plaintiff in error, a national bank, for the penalty for usury. The action was brought in the Superior Court of Cleveland county, N. C., and the complaint alleged that the defendant (plaintiff in error) did a general banking business at Charlotte, N. C. The town of Charlotte is in the county of Mecklenburg. The defendant (plaintiff in error) appeared and filed pleas in bar (record, page 9), but filed no plea to the jurisdiction, and did not ask to have the case removed to Mecklenburg county. Under the provisions of the act of Congress of February 18, 1875 (Revised Statutes, §5198), any State, county or municipal court in the county or city in which the association is located has jurisdiction to try actions against them.

POINTS PRESENTED.

1. Does it sufficiently appear on the record that any Federal question is presented?

2. Did the State court err in deciding that the plaintiff in error had waived the question of jurisdiction by pleading to the merits and going to trial in Cleveland county?

First point: It nowhere appears in the record that any right under any statute of the United States was claimed by the plaintiff in error, and that the decision of the Supreme Court of North Carolina was adverse to such right. *Gibson* v. *Chauteau*, 8 Wall., 314.

It is admitted that since the decision in *Gross* v. *Mortgage Company*, 108 U. S., 484, this court can look into the opinion of the State court to see whether any Federal question was presented. The opinion of the State court in this case admits the right claimed, but decides that, in accordance with the State practice, the plea to the jurisdiction was not interposed in apt time. This is a question of practice which this court will not review.

In *Commercial Bank* v. *Rochester*, 15 Wall., 639, the Court say: "It is said in this case that the Court *must* have decided in favor of the validity of the tax, which, it is conceded, would have given this court jurisdiction. But this does not appear either affirmatively or by necessary intendment. For the case may have been decided on the form of the remedy which the practice in the State courts required the plaintiff to adopt, *or on the technical insufficiency of the pleading.*"

The act of Congress (Revised Statutes, §5198), gives to certain State courts jurisdiction of all actions against national banks, and if the action is brought in the wrong State court it is only a question under the State statutes regulating a change of *venue*, and the decision of the State court on the construction of these statutes is not subject to review in this court. *Insurance Co.* v. *The Treasurer*, 11 Wall., 204; *Klinger* v. *Missouri*, 13 Wall., 257.

It is therefore insisted that the decision of the State court did not deny the plaintiff in error the right to remove the case, under the act of Congress, but only decided that under the State statutes and decisions in regard to *venue*, the application to remove was not made in apt time. To support this position the decision in *Insurance Co.* v. *The Treasurer*, 11 Wall., 204, is relied on, in which this language is used: "Had the State court decided

against the *right* of the plaintiff, and had it so appeared by the record, the jurisdiction of this court would have attached to the case. But it does not appear. It only appears that they have decided that the plaintiff has no *remedy* under this statute. Its right to recover the illegal tax is undisputed, but not to recover it in this way." *Carter* v. *Bennett*, 15 Howard, 354–357.

Second point: Did the State court err in deciding that the plaintiff in error had waived the question of jurisdiction by pleading to the merits and going to trial in Cleveland county.

The Superior Court of Cleveland county, in which the action was brought, is a court of general jurisdiction (*Brooks* v. *Morgan*, 5 Ired. Law, on page 485), and had jurisdiction of the subject-matter of the action, and of the person of a national bank. Unless there be some peculiar circumstance excluding the plaintiffs or exempting the defendant, and if there be any such, it must be brought forward by plea to the jurisdiction. (*Carter* v. *Bennett*, 15 Howard, 357). Under the act of Congress the Superior Court of Mecklenburg county had jurisdiction in all actions against national banks, and both courts had jurisdiction in local actions, under the regulations of the State statutes. (*Casey* v. *Adams*, 102 U. S., 66). It will be noted that the question is not one of jurisdiction between the Federal and State courts, but only in which State court the action should be brought. In other words, the State courts have jurisdiction, and it is only a question of *venue*. Under the decisions in North Carolina, the fact that the court does not have jurisdiction of the person must be taken advantage of by plea in abatement, otherwise the jurisdictional question is waived, and the court can render a valid judgment. *Branch* v. *Houston*, Busb., 85; *McMinn* v. *Hamilton*, 77 N. C., 300; *Cloman* v. *Staton*, 78 N. C., 235.

The Code of North Carolina, §190, provides: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided in this Code: (1). For the recovery of real property, or

of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property."

In *Lafoon* v. *Shearin*, 91 N. C., 370, an action was brought in the county of Wake to recover an interest in land lying in the county of Granville. The defendants did not plead to the jurisdiction, but filed pleas in bar. The Supreme Court held that by failure to plead to the jurisdiction it was waived, and the Superior Court of Wake acquired jurisdiction.

By section 195 of The Code of North Carolina it is provided: "If the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties or by the order of the court. The court may change the place of trial in the following cases: (1). When the county designated for that purpose is not the proper county," etc.

If the plaintiff in error had taken advantage of the fact that the action was brought in the wrong county, by proper plea, the only result would have been a change of *venue*. But it does not file such a plea, but pleads in bar and goes to trial, and after an adverse judgment, both in the lower court and on appeal, it now asks this court to declare the judgment a nullity, because the case was tried in one county instead of another, when it failed to ask for the removal in proper time.

The act of July 12, 1882, giving generally jurisdiction to the State courts over national banks, does not apply to this case, as that act applies only to "suits hereafter to be brought," and this action was commenced on June 19, 1882, a few days before that act was passed. But this act shows the policy of Congress in regard to suits against national banks, and this court will, as far as it can do so, so construe the former statute as to make it conform to the declared policy of Congress, as expressed in the last act, which is construed in *Leather Mfg. Bank* v. *Cooper*, 120 U. S., 778. The only effect of a reversal of the judgment would

be to send the case back, to be tried again in a new action in the same county, the courts of which now have undisputed jurisdiction.

"The objection to jurisdiction upon the ground of citizenship in actions at law can only be made by plea in abatement. After the general issue it is too late." *DeSobry* v. *Nicholson*, 3 Wallace U. S., 423; *Carter* v. *Bennett*, 15 Howard, 354.

It is frequently the case that acts of Congress so directly refer to State statutes *in pari materia* that the latter are by construction made parts of the former which without the latter could not be carried into execution. This is eminently so in the case of the election laws of the United States, the machinery for the execution of which is provided by the States. The State statute for many purposes is a part of the act of Congress to the same extent as if the provisions which are applicable thereto were repeated therein and offences are committed under their joint operation. This is illustrated in *Ex-parte Seebold*, 100 U. S., 371, and *Ex-parte Yarborough*, 110, 671, and cases cited.

And in civil causes when an action or suit is brought in a court of the United States for a cause of action arising under a State statute or law, the practice and procedure is governed by the law of the United States applicable to such courts; and for the same reason when an action is brought in the State courts on a cause of action given by a United States statute the practice and procedure is such as the State law declares for its courts. The U. S. statute cannot declare that in such cases the distinction between courts of law and courts of equity shall continue to be observed nor can the State statute declare that in such cases this distinction shall be disregarded. In each class of case the "*lex fori*" prevails, and each administers the right according to its own system of practice and procedure.

The question before the court is one of practice and procedure only in which the State statute governs. *Carter* v. *Bennett*, 15 Howard U. S., 357; *Jones* v. *McMasters*, 20 Howard, 22.

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